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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 1010

JOHN TERREL HAMPTON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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WO. 1-2452 — WO. 1-2453

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IN THE

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No. .....

JOHN TERREL HAMPTON,
Petitioner,
v.
UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on December 5, 1968.

OPINION BELOW

The order entered by the District Court for the Eastern District of Michigan, Southern Division, on the 4th day of April, 1967, is printed in Appendix A, *infra* pages 11. and 12. The opinion of the Court of Appeals for the Sixth Circuit entered on December 5, 1968 is reported at page 13.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 5th, 1968, and a copy of the Order is printed in the Appendix B at page 13 . The jurisdiction of the court is invoked under Title 28 U.S.C. Sec. 254, paragraph (1), providing for the granting of a writ of certiorari upon the petition of any party after rendition of judgment by the Court of Appeals.

QUESTIONS PRESENTED

The petitioner was convicted on the uncorroborated testimony of one Quincy Lucille Robinson, a woman who by her own admission acknowledges 10 convictions for prostitution. The petitioner was convicted of violating Title 18 U.S.C. Section 2421, more commonly known as the MANN ACT.

The district court, sitting as trier of fact, completely disregarded the testimony of John Terrel Hampton, petitioner herein, and other witnesses. Further, the Court of Appeals affirmed. The questions presented are:

1. Was the evidence presented, taking into consideration the character and credibility of the witnesses, sufficient to establish petitioner's guilt beyond a reasonable doubt when it is inconsistent with the corroborated testimony of the petitioner and others?
2. Does Quincy Lucille Robinson, a known and frequently convicted prostitute fall within the purpose of the legislative intent of congress with regards to the MANN ACT? Is Quincy Lucille Robinson the kind of woman the act was meant to protect?
3. Did the judge sitting as the trier of fact abuse his judicial discretion by seemingly disregarding the testimony of witnesses?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which are relevant to decision of this case, the text of which is set forth in Appendix C hereto are Amendment V of the United States Constitution and Amendment VI of the United States Constitution.

STATEMENT OF FACTS

On an undetermined date early in the month of September, 1963, Quincy Lucille Robinson obtained information regarding the possibility of prostituting herself in Terre Haute, Indiana (page 12). Quincy Lucille Robinson admits on Cross-Examination that John Terrel Hampton was not with her when she received the information (page 32, Cross-Examination). Quincy Lucille Robinson admits to being a prostitute at the time she obtained said informa-

tion (page 8) and further admits being a prostitute for 15 years starting in either 1952 or 1953 and many years prior to her meeting the defendant (pages 6 and 7). Quincy Lucille Robinson admits making arrangements and leaving for Terre Haute, Indiana (page 15). Quincy Lucille Robinson stating John Terrel Hampton drove her to the Greyhound Bus Terminal with John Terrel Hampton purchasing her ticket and Petitioner states he drove her to the Bus Depot but she purchased her own ticket. Thereafter, Quincy Lucille Robinson left the State of Michigan and went to Terre Haute, Indiana and prostituted for 6 weeks (page 20), after which she returned and for a short time lived with Petitioner. Some time before the end of the year the relationship dissipated and Quincy Lucille Robinson moved.

A complaint was issued against John Terrell Hampton on September 30, 1964 by F.B.I. which stated:

> That on or about September 3, 1963 in the Eastern District of Michigan JOHN TERREL HAMPTON did knowingly persuade, induce and entice a woman, that is QUINCY LUCILLE ROBINSON, to go from *DETROIT,* State of Michigan, to *TERRE HAUTE,* State of Indiana, for the purpose of prostitution and debauchery and for other immoral purposes and with the intent and purpose on the part of JOHN TERREL HAMPTON that QUINCY LUCILLE ROBINSON should engage in the practice of prositution and debauchery and other immoral practice, and JOHN TERREL HAMPTON did thereby knowingly cause QUINCY LUCILLE ROBINSON to go and be carried and transported as a passenger upon the line and route of the *Greyhound Bus Lines,* a common carrier in interstate commerce; and the complainant states that this complaint is based on statements of QUINCY LUCILLE ROBINSON and an investigation conducted by agents of the Federal Bureau of Investigation.

Trial was held on Tuesday, April 4, 1967 before Honorable Thomas P. Thornton, District Judge for the Southern Division in the United States District Court for the Eastern District of Michigan without a jury. Judge Thornton found petitioner guilty as charged in the indictment. On June 1, 1967 petitioner was sentenced to be imprisoned for three years. Appeal was filed with the United States Court of Appeals for the 6th Circuit and on December 5, 1968 an Order was filed affirming the judgment of the District Court. Therefore, a Motion was filed to Stay the Issuance of Mandate pending this appeal and on January 3, 1969 said motion was granted and order entering Staying Issuance of Mandate until February 2, 1969. Whereupon, petitioner by his attorney Albert A. Goldfarb, Motioned the Supreme Court of the United States to extend time to file petition for Writ of Certiorari, said Motion being granted and time extended to February 3, 1969.

REASONS FOR GRANTING WRIT

The district court, sitting as trier of fact, found John Terrel Hampton guilty of knowingly persuading, inducing and enticing one Quincy Lucille Robinson to engage in prostitution across a state line, to wit: from Michigan to Indiana. The arguments against such a finding of guilt are two-fold. First, that the facts and evidence presented at the trial do not warrant such a finding and second, that Quincy Lucille Robinson, by her own admissions, was not of the nature and character of person that the "White Slavery Act" was intended to protect and thereby it was not applicable and as a result not violated.

With regards to the facts and evidence presented I respectfully bring to this court's attention that Quincy Lucille Robinson charged her former lover John Terrel Hampton

with sending her to Terre Haute, Indiana for the purpose of prostitution. The testimony at the trial, however, by Quincy Lucille Robinson should leave doubt as to the truth of her complaint wherein she states: first, that she herself obtained the information from a friend about business opportunities in Terre Haute, Indiana (page 12); this should have indicated an intention on the part of Quincy Lucille Robinson to go to Terre Ha[redacted] prior to any conversation with John Terrel Hampton, the intent thereby originating with her; second this is substantiated by Quincy Lucille Robinson admitting that John Terrel Hampton was not with her when she received this information (page 32, Cross-Examination); third, she admits to being a prostitute at the time (page 8) and further, that she had actively been engaged in her profession since 1952 or 1953 and the length of time totaling 15 years, which would bring her up to approximately 1967; fourth, she admits making arrangements and leaving for Terre Haute, Indiana (page 15); fifth, Quincy Lucille Robinson admits making "business arrangements" with a woman named "Audrey" in Terre Haute, Indiana (page 21); sixth, she indicates she left because ". . . the police were hot . . ." in Detroit (page 36 Cross-Examination). If that was not enough to cast doubt on the allegations of the complaint then there was the testimony of one Audrey Dorsey, the madam of the house of prostitution in Terre Haute, Indiana who stated that she only saw or spoke to John Terrel Hampton on one occasion and that was in Terre Haute, Indiana after Quincy Lucille Robinson had already been there and working (page 7 and 8). All that is indicated herein should have created in the mind of the trier of fact sufficient doubt as to not warrant a conviction in this matter.

The purpose of the "White Slavery Act" or the Mann Act as it is also called, is two-fold. First to keep prostitu-

tion out of interstate commerce and second, to protect women. It is Petitioner's contention that this act does not apply to the facts of this case. That this was also an abuse of discretion on the part of the trier of fact. The purpose of calling witnesses is to determine the facts and if said trier of fact disregards the testimony of witnesses then the purpose of calling them is defeated. The facts brought to the attention of the court in this case, by three witnesses, Quincy Lucille Robinson, John Terrel Hampton and Audrey Dorsey were that Quincy Lucille Robinson had been a prostitute in the past, was one at the time she left for Terre Haute, Indiana and that she remained the same thereafter, that the reason she left Detroit, Michigan was not at the insistence or direction of John Terrel Hampton but because ". . . the police were hot . . ."

The "White Slavery Act" was passed to prevent ". . . the sale of young and innocent girls for immoral purposes . . ." *Comonetti v. United States,* 242 United States 470, at page 495, 37 S Ct 192, 61 L Ed 442.

Looking further we find in *Wyatt v. United States,* 362 United States 525 (1960).

> "The primary purpose of the Mann Act was to protect women who were weak from men who were bad." *Denning v. United States,* 247 F. 463 at 465.

It does not say "women who were bad from men" which is more fitting in the case at hand!

Further, in Wyatt at page 530 it states:

> ". . . As the legislature history discloses, the act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves . . .

This certainly cannot be made to apply to Quincy Lucille Robinson.

In the Dissent at page 535 by Justice Warren it states:

> ". . . It is true of course that the Federal Court has the authority to interpret the common-law principles of evidence 'in the light of reason and experience.'"

But it should be added: not in utter disregard of the facts, the testimony, the character of the witnesses and the circumstances. The judicial process precludes a justice from not weighing the testimony of all parties. It seems impossible that a judge could give so much weight to Quincy Lucille Robinson's testimony in the light of her admitted activities in the area of prostitution and have so little regard for the testimony of John Terrel Hampton and Audrey Dorsey that the legal requirement of the criminal law of proof of guilt "beyond a reasonable doubt" was satisfied!

Where intent is made an element of crime the prosecution has the burden of proving the state of mind of the accused, *Commonwealth v. Carter,* 306 Mass, 141, 27 NE 2d; *People v. Jones,* 293 Mich 409, 292 NW 350,—that is of proving that the act was done with the requisite specific intention, *Simpson v. State,* 81 Fla. 292, 87 So 920. In a prosecution under a statute using the word "knowingly" it has been held incumbent upon the prosecution to prove that the accused had knowledge of facts sufficient to render the act or omission of a crime, but not that the accused knew that the act or omission itself was unlawful, *People v. Shapiro,* 4 NY 2d, 597, 176 NYS 2d 632, 152 NE 2d 65, 69 ALR 2d 973. John Terrel Hampton most likely knew what Quincy Lucille Robinson was going to do in Terre Haute, Indiana but that doesn't make him part of the crime.

Moreover, where all evidence offered should be relevant to some issue in the case and have a material bearing upon it, the court should not exclude the evidence on the ground of its weakness, *Baker v. State,* 86 Neb. 775, 126 NW 300, or because of the possibility of its being false, *Scott v. O'Brien,* 129 Ky. 1, 110 SW 260, and a serious doubt as to the admissibility of evidence in a criminal matter should be resolved in favor of the accused, *Gambrell v. State,* 92 Miss. 728, 46 So. 138, 17 LRA (NS) 291, Am. St. Rep 549, 16 Ann Cas 147. The trial court erred in disregarding the testimony of the defendant, John Terrel Hampton, Audrey Dorey and Paul Chaiken.

In conclusion, I wish to submit that the number in Terre Haute, Indiana was given to Quincy Lucille Robinson and not to John Terrel Hampton. Quincy Lucille Robinson was leaving Detroit! John Terrel Hampton did not put the crime in motion, he did not go out and look for a place for her to prostitute, she did that by her own admission (page 32 transcript). Petitioner drove her to the bus station. As to the question of whether or not he bought her the ticket? Whether or not he purchased the ticket, does not itself establish intent. If a man sent a wife or girlfriend out of town for a vacation and she prostitutes, surely the man can not be held responsible unless it is proven beyond a reasonable doubt that he intended her to prostitute. In the case before this court we have a known prostitute with numerous convictions and arrests, we have a boyfriend-girlfriend relationship that terminated and quite obviously with bad feelings. It seems hard to believe that a judge sitting as trier of fact could completely disregard the testimony of the defendant and of Audrey Dorsey and give full unequivocal credence to the testimony of Quincy Lucille Robinson, prostitute. The presumption of law that requires proof of guilt beyond a reasonable doubt surely could not have been satisfied by her testimony alone!

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALBERT A. GOLDFARB
Attorney at Law
3300 Guardian Building
Detroit, Michigan 48226

Dated: February 1, 1969.

APPENDIX A

Trial and Findings

At a session of said Court held in the Federal Building, in the City of Detroit, Michigan on the 4th day of April, 1967.

Present: Honorable Thomas P. Thornton, United States District Judge.

This matter having come on for trial without a jury, the government being represented by Robert J. Grace, and the defendant being present in Court and represented by Clayton L. Davis, Jr.,and having heard the proofs and testimony of witnesses and the arguments of counsel, and being duly advised in the premises, the Court finds the defendant John Terrel Hampton, guilty as charged in the Indictment.

The defendant is referred to the Probation Department for investigation and report, and his appearance bond is continued in full force and effect.

Thomas P. Thornton
United States District Judge

Judgment and Commitment

On the 1st day of June, 1967, came the attorney for the government and the defendant appeared in person and by counsel, Clayton L. Davis, Jr.

It is adjudged that the defendant has been convicted upon his plea of not guilty and finding of guilty of the offense of interstate transportation of female for the purpose of prostitution; in violation of Section 2421, Title 18, U.S.C., as charged in the Indictment; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years.

The defendant's appearance bond hereby cancelled.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Thomas P. Thornton
United States District Judge

Frederick W. Johnson,
Clerk

APPENDIX B

No. 18,530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
John Terrel Hampton,
Defendant-Appellant.

Order

(Filed December 5, 1968)

Before: O'Sullivan, Peck and Combs, Circuit Judges.

On consideration of the appeal the Court finds that there is substantial evidence to support the judgment of conviction of the District Court sitting without a jury, and that no prejudicial error has intervened. Accordingly,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court

Carl W. Reuss
Clerk

APPENDIX C

United States Constitution—Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution—Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

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JOHN F. DAVIS

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1023

ROBERT E. RATH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____.

ROBERT E. RATH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Robert E. Rath, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed January 8, 1969, affirming the verdict of conviction by a jury to eight counts of income tax evasion reached on November 7, 1967, in the United States District Court at Toledo, Ohio and entered as a judgment on December 11, 1967.

OPINIONS BELOW.

On November 7, 1967, a jury found the defendant guilty of eight counts of income tax evasion in the District Court for the Northern District of Ohio, Western Division in Toledo, Ohio, and Judgment was entered December 11, 1967. (Appendix 1.)

On January 8, 1969, the United States Court of Appeals for the Sixth District filed its judgment with the

Clerk thereof and this judgment affirmed the verdict and judgment entered by the District Court in Toledo on December 11, 1967. (Appendix 2.)

STATEMENT OF JURISDICTION.

The judgment sought to be reviewed was handed to the Clerk of the United States Court of Appeals for the Sixth District on January 8, 1969.

On January 16, 1969, the United States Court of Appeals for the Sixth Circuit granted a stay of mandate to and including February 7, 1969.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is 1254 (1) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

Where a government exhibit, namely Government's Exhibit No. 328, purports to be a summary of specific items to be adjusted, income computations, analysis of earnings and surplus, computations of taxable incomes of two corporations for several years, in which corporations defendant had an interest, and computations of defendant's individual income for several years (and which were the work of Michael C. Schiller, Technical Adviser to the Assistant Regional Commissioner for Enforcement Activity, who was permitted to stay in the courtroom during the entire proceedings, who as the last of the witnesses for the government had personally examined, classified and interpreted all of the exhibits introduced by the government, in said exhibit) is admitted into evidence and copies thereof are passed out to the jury, does not the admission of said exhibit into evidence and its unrestricted use by the jury constitute prejudicial error?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The 16th Amendment to the Constitution of the United States is the basis of the federal jurisdiction:

Constitution of the United States of America, Amendment XVI—Income Tax.

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Defendant was convicted of violations of Section 7201 of Title 26, United States Code:

Section 7201 of Title 26.

"7201. Attempt to evade or defeat tax.

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more that $10,000—or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE.

The trial court overruled the objections of the petitioner directed to the admissibility of the testimony of 69 Government witnesses on direct examination. The basis of petitioner's objections lay in the fact that the testimony was immaterial and irrelevant. The court admitted the testimony upon the prosecution's promise to present a "summarizing" witness and thereby tie it all together.

The Government's 70th witness was qualified as an expert witness and thereafter he became the "summarizing" witness who, over the objections of the petitioner presented each of the jurors a photo-copy of his summary identified as Exhibit No. 328,

This Exhibit No. 328 was composed of highly refined abstracts of the testimony of the proceeding 69 witnesses and these abstracts were made the basis of adjustments to the income tax returns of the petitioner without regard to credibility or any other matter that the jury might have taken into consideration in evaluating or acting upon the evidence.

While it would be unfair to say that all questions of doubt were resolved in favor of the Government, let the petitioner be heard to say that few, if any, doubts were resolved in his favor.

Petitioner here was convicted on the basis of otherwise inadmissible testimony cured of its irrelevancy or immateriality by an Agent of the Internal Revenue Service, who applied said testimony to the adjustment of petitioner's income tax returns.

REASONS FOR ALLOWANCE OF THE WRIT.

The Writ should be allowed and this cause remanded for a new trial because the court in its rulings exceeded the permissible limits implicit in the rule announced in *United States vs. Johnson,* 319 U. S. 503 which held that:

> "Admission of testimony of an expert witness regarding income and expenditures of one of the accused in this case, although consisting of computations based on substantially the entire evidence in the record, held not an invasion of the province of the jury, where, in the light of the judge's charge, all issues are left to the independent, unforeclosed determination of the jury." (Head note No. 11. Discussed fully at page 519.)

The jury was permitted to hear otherwise inadmissible evidence on the one hand, and, on the other hand, was permitted to be influenced by Exhibit No. 328, which was not evidence in any sense of the word. (Appendix 3.)

Petitioner contends that even though Exhibit No. 328 is scrupulously clear of any error of commission, the composition of Exhibit No. 328 is by its very nature, a process involving the weighing, choosing and deciding of evidence and, to the extent that this is so, the province of the jury is invaded. Furthermore, the size, completeness, polished suavity and the obvious "know-how" of the completely competent author will logically affect its readers. The readers so affected could have been the jury.

It is beyond reasonable doubt that the jury was prejudiced by Exhibit No. 328 and this prejudice was not neutralized by the instructions of the court. (Appendix 4.)

CONCLUSION.

It is respectfully suggested that this case presents a problem in evidence not only vital to the petitioner but vital to every citizen of the United States in guaranteeing constitutional rights in criminal matters. This truly was a trial in which the petitioner was convicted by a mass of irrelevant testimony completely immaterial to the accusation, converted, digested and re-presented to the jury in writing by an expert witness compelling the jury to a verdict of conviction.

Petitioner prays that the judgment of conviction be reversed and the sentence revoked, or, in the alternative, to allow the Writ and remand the case for a new trial.

Respectfully submitted,

WILLIAM J. MACDANIELS,
819 Spitzer Building,
Toledo, Ohio 43604,
Counsel for Petitioner.

APPENDIX 1.

JUDGMENT AND COMMITMENT.

(Filed December 11, 1967.)

On this 11th day of December, 1967, came the attorney for the government and the defendant appeared in person by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and verdict of guilty by jury has been convicted of the offense of wilfully and knowingly attempting to evade and defeat Federal Income Tax, Violation Title 26, U.S.C., Sec. 7201, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years on each of eight (8) counts to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DON J. YOUNG,
United States District Judge.

APPENDIX 2.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed January 8, 1969.)

Before WEICK, Chief Judge, and PECK and MCCREE, Circuit Judges.

Appellant contends primarily in this appeal that the presence of an unauthorized person in the grand jury room rendered the indictment returned by it invalid and that receipt in evidence of a summary statement prepared by an expert constituted prejudicial error. A technical violation of Rule 6(d), Federal Rules of Criminal Procedure, occurred when an attorney who was a stranger to this action unintentionally interrupted the grand jury proceedings by entering the courtroom in which they were being conducted. The record establishes that the proceedings were halted at the moment of his entrance, and were not resumed during the fifteen to twenty second period of his presence. We hold that the interruption did not invalidate the proceedings or the indictment.

The eight-count indictment charged violations of 26 U.S.C. 7201. The Government offered extended testimony and several hundred exhibits in support of the charges of violations of the Internal Revenue Code, and the summary exhibit was offered by an expert whose qualifications were not (and are not) challenged, and who was available for cross-examination. The exhibit was based upon evidence previously received and the trial judge properly instructed the jury concerning it. Under such circumstances the exhibit was properly received in evidence (*Epstein v. United States*, 246 F.2d 563 (6th Cir. 1957), *cert. denied*, 355 U.S. 868; *Barber v. United States*, 271 F.2d 265 (6th Cir. 1958)), and the record discloses no impropriety in its use.

The remaining contentions of the appellant are determined to be without merit, and accordingly,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

APPENDIX 3.

EXCERPTS FROM TRANSCRIPT OF TRIAL.

EXAMINATION OF WITNESS SCHILLER.

(1239) Q. Do you have those schedules with you? A. Yes, I do.

Q. Were all these schedules prepared by you, Mr. Schiller? A. They were all prepared under my supervision. The summary schedules, which begin with schedule 1, the even numbers being the ones prepared exclusively by me. The schedules labeled 1-A or 2-A or 2-B, and so forth, were prepared by other Internal Revenue Agents under my supervision, but they were reviewed entirely by me.

Q. You checked them for accuracy? A. Yes, I did.

Q. I show you Government Exhibit 328, Mr. Schiller, and I will ask you whether this is a true copy of the contents of that Exhibit? A. This is a reproduction of my schedules, yes, sir. Some of the schedules have been reduced in size, but it is an exact reproduction.

Mr. Walker: Your Honor, the Government offers Exhibit 328 at this time.

Mr. MacDaniels: Objection.

Mr. Walker: I also request permission to distribute copies of this exhibit to the members (1240) of the Jury and to the Court and to Defense Counsel.

The Court: What is the ground of the objection?

Mr. MacDaniels: I object to its admission. I think

if you will rule on that first we can get to the second Motion.

The Court: What is the ground of the objection to its admissibility?

Mr. MacDaniels: It is not evidence.

The Court: What do you say to that, Mr. Mattimoe?

Mr. Mattimoe: It is a summary of evidence, as the witness stated, and it is his summary upon which he will base his conclusions. We have authorities if the Court desires.

The Court: It will be received.

Mr. MacDaniels: Objection.

The Court: I presume your Motion that these copies be handed to the members of the Jury is so that they can follow the discussion?

Mr. Walker: That is correct. These are exact reproductions of the schedules that will permit the Court, Defense Counsel and the members of the Jury to follow the witness' testimony.

(1241) The Court: Do you have any objection to that, Mr. MacDaniels?

Mr. MacDaniels: Yes, the Defendant objects to that.

The Court: On what grounds?

Mr. MacDaniels: It is not evidence.

The Court: Objection overruled, and the Motion will be granted. You may hand each of the Jurors a copy of the Exhibit.

Mr. MacDaniels: I would like to add to my grounds the fact that the Defendant feels this Exhibit 328 is not evidence. I would like to add the ground that it is prejudicial.

The Court: I will adhere to my ruling. It will be admitted and the Jurors can be handed copies of it so that they can follow it.

Mr. MacDaniels: To speed things up a little, at this time I would like to make a general objection to each and every question based upon Government Exhibit 328 addressed to the witness.

The Court: I will give you a general objection to each and every question.

(1242) Mr. MacDaniels: Yes, to be propounded by the Government.

The Court: All of this witness's testimony will come in over your objection and exception.

Mr. MacDaniels: Fine.

Q. Now, Mr. Schiller, referring to page one of Exhibit 328, would you describe the format of that schedule to the Jury so that they might follow your testimony? A. Yes. The format that is followed throughout, not just with page one but for clarification—is that page one is also labeled schedule one in the upper left-hand corner. Page two is a continuation of schedule one; and page three, we will take these three pages together just for clarification.

Page three is labeled in the upper left-hand corner Schedule 1-A, and in the upper right-hand corner is labeled Schedule 1-B.

Now, those three pages present a unit. Those units will be repeated as we go through the schedules 1, 2, 3 and so forth.

To start with, Schedule one and pages one, two and three will be a unit. Page one, Schedule one, is labeled a Summary Of Specific Items To Be Adjusted To Pac-Rite Industries For The Calendar Year 1960.

* * * * *

APPENDIX 4.

CHARGE OF THE COURT TO THE JURY.

(1853) It now becomes my duty to charge you as to the law in this case. While you are the sole judges of the facts and the credibility of the witnesses, your oath requires you to accept the law as it is given by the Court, and to apply that law in your deliberations. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

This particular case began with the return of an indictment by the Grand Jury. This indictment is not evidence for any purpose. The indictment is the instrument used to inform the defendant of the criminal acts with which he is charged. The fact that it was returned may not be considered as evidence or as raising any presumption against the defendant.

A plea of "not guilty" has been entered to the indictment. This plea is a denial of the charges, and puts in issue all the essential elements of the crimes charged.

Under the Constitution of the United States, one charged with crime is presumed to be innocent until proven guilty. This presumption remains with the defendant until it is overcome * * *.

* * * * *

(1873) * * * This is a criminal case. The defendant is charged under the law with the commission of a crime, and the fact that he has or has not settled the civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case, except as it may throw some light on the intent of the defendant.

There have been admitted in evidence certain exhibits variously referred to as schedules or summaries.

Strictly speaking, these exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded that it is the books, records and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For that purpose, you are entitled to consider them.

* * * * *

PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1,030

ALFRED E. COLEMAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA and STEWART L. UDALL, Secretary of the Interior,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1968
No. .....

ALFRED E. COLEMAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA and STEWART L. UDALL, Secretary of the Interior,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, particularly Alfred Coleman, petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit dated December 4, 1968.

Opinion Below.

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered December 4, 1968. A copy thereof is appended to this petition at Appendix pages 1-3 hereof.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

A motion to stay the mandate was issued by the United States Court of Appeals for the Ninth Circuit until January 25, 1969, for filing this petition for writ of certiorari.

Constitutional Provisions, Statutes and Federal Rules and Regulations Involved.

Articles I and II of the United States Constitution.

The pertinent portions of Article V of the United States Constitution and Article XIV of the Amendments thereto.

The Mining Laws of the United States, as amended, 30 U.S.C. Sections 21, *et seq.*, particularly Section 161, The Building Stone Act of 1892.

The Administrative Procedure Act of the United States, 5 U.S.C., Chapter 5, Sections 500, *et seq.* (formerly Chapter 19, Sections 1001, *et seq.*), especially Section 552 thereof.

The Common Varieties Act of July 23, 1955, 30 U.S.C. Section 611.

Rules and regulations of the Department of the Interior relating to mining, particularly 43 C.F.R. 3511.1-(a) and (b).

Questions Presented.

1. Was it proper for the Court of Appeals for the Ninth Circuit by its Order dated December 4, 1968, to refuse to rule on the issues presented to it in our Petition for Hearing or Rehearing, dated June 17, 1968, because that Court felt it had no discretion under the mandate sent to it by this Court with its decision of April 22, 1968?

In his concurring opinion Chief Judge Chambers makes the following comment:

> "There is a puzzle here: Why did the Supreme Court remand the case to us?

But I have reluctantly concluded it left us no discretion. I have tried and failed to find some way we could salvage some part of our original opinion (see 363 Fed. 2d 190) for which I retain my fondness." (Emphasis added)

2. Has Alfred Coleman been denied his constitutional rights, and particularly due process, by the administrative proceedings in the Department of the Interior and in the Court reviews thereof?

Statement.

I.

This petition grows out of the decision of this Court in the case of *United States v. Coleman, et al.*, dated April 22, 1968, 390 U.S. 599.

A copy of that decision was sent to the United States Court of Appeals for the Ninth Circuit, containing the following mandate:

"* * * The case is reversed and remanded to the Court of Appeals for the Ninth Circuit for further proceedings to carry out this decision."

In its decision in the case of *Ex parte Medway*, 90 U.S. 504, at pages 506-507, this Court stated:

"Our mandate required the Court of Claims to proceed in the cause remanded in conformity to law and justice. We did not undertake to direct what law and justice did require, any further than to say that upon the finding of facts appearing in the record sent to us upon the appeal, the judgment was erroneous. *In everything else the Court of Claims was left free to proceed with the cause in its own way and according to its own judicial discretion. That discretion we cannot control in this form of proceeding.*" (Emphasis added).

As there were several questions involved in this case which were not passed upon by the Supreme Court in its decision of April 22, 1968, and as several other questions arose because of that decision, Coleman, *et al.* filed a petition with the United States Court of Appeals for the Ninth Circuit to consider and determine the following questions:

(a) Does the stone covered by the Coleman mining claims have a property or properties giving it "distinct and special value" under 30 U.S.C. Section 161, as pointed out as necessary by the Supreme Court of the United States in its decision of April 22, 1968?

(b) This Court decided that the Common Varities Act applied to the Coleman mining claims because of a dictionary definition submitted by the attorneys for the United States that quartzite is a most common stone. The Court of Appeals for the Ninth Circuit was asked in our petition to determine whether the definition of common varieties by the Department of the Interior dated September 7, 1962, and published in 27 Federal Register on September 14, 1962 (43 C.F.R. 3511.1(a) and (b)) exclude the building stone on the Coleman mining claims from the definition of common varieties? (See Appendix B, page 4 hereof).

(c) This Court in its opinion of April 22, 1968, found that the so-called "marketability at a profit" test was a logical complement to the old "prudent man" rule. Since this Court did not determine whether the "marketability at a profit" rule had been properly promulgated by the Department of the Interior, the United States Court of Appeals for the Ninth Circuit was asked by us to determine that question because the Administrative Procedure Act, 5 U.S.C., Chapter 5, Sec-

tion 552 requires that an addition to current regulations must be published in the Federal Register so that the public will be fully apprised of such "amendment or revision." Therefore, if the marketability at a profit "complementary" rule was not so published, we asked that the United States Court of Appeals for the Ninth Circuit declare said "complementary" rule invalid.

(d) The United States Court of Appeals for the Ninth Circuit was asked to determine whether the rule of "marketability at a profit" was unconstitutional because it is vague, indefinite and uncertain.

II.

(a) In its decision of April 22, 1968, this Court determined, based upon the unsupported suggestions of the attorneys for the Department of the Interior, that Section 161 of the mining laws was "* * * entirely effective as to building stone that has 'some property giving it distinct and special value' (expressly excluded under Section 611)."

As the meaning of Section 161 of the mining laws was not an issue in the contest hearing or any appeals thereof within the Department of the Interior, there was no evidence before this Court from which it could determine either of the following questions:

> "(1) What is the special type of building stone still covered by Section 161?
>
> (2) Was and is the building stone on Mr. Coleman's mining claims of the type specified by this Court?

To ascertain these facts the case should be returned to the Department of the Interior for further hearing

and we so requested the United States Court of Appeals for the Ninth Circuit. That Court felt it had no discretion under your mandate.

(b) This Court in its decision of April 22, 1968, stated that the "marketability at a profit" rule used by the Department of the Interior against Mr. Coleman was a "logical complement" to the "prudent man" rule. This Court had not been informed that the "marketability at a profit" rule had not been properly promulgated by the Department of the Interior by publication in the Federal Register, as required by the Administrative Procedure Act (5 U.S.C. Section 552). See Appendix D, page 7 hereof.

Research has proved that the "marketability at a profit" rule had never been published in any edition of the Federal Register, and it has not been published in any of the documents issued by the Department of the Interior for the information of the members of the public who desired to locate mining claims.

We, therefore, asked that this question be ruled on by the United States Court of Appeals for the Ninth Circuit.

It, therefore, would appear that the decision of this Court, dated April 22, 1968, should be modified as to the mandate sent to the United States Court of Appeals for the Ninth Circuit, in accordance with the prior decision of this Court in the case of *Ex parte Medway,* 90 U.S. 504, 506-507, from which we quote above, to permit these questions to be considered and determined by the United States Court of Appeals for the Ninth Circuit.

(c) While the attorneys for the Department of the Interior claimed in their Brief to this Court after cer-

tiorari was granted that the "marketability at a profit" rule has been used as a discovery test for a long time, they offer no proof and the facts do not sustain that statement. The "prudent man" test, in use since 1894, has been approved by the Supreme Court of the United States several times, one of the latest decisions being *Best v. Humbolt Placer Mining Company,* 371 U.S. 334 (January 4, 1963). There is no reference in that decision by this Court to "marketability at a profit." Since this Court held that the "marketability at a profit" rule was a "logical complement" to the old "prudent man" rule, it comes within Section 552 of the Administrative Procedure Act, which provides in part as follows: "* * * each amendment, revision or repeal of the foregoing must be published in the Federal Register."

Further proof that "marketability at a profit" was not used until recently is evidenced by a pamphlet issued by the House Committee on Interior and Insular Affairs covering a hearing held by the Subcommittee on Friday, February 1, 1957. This report covers a hearing before that Committee growing out of alleged abuse by the Department of the Interior in the administration of the Common Varieties Act which was passed July 23, 1955. Various employees of tte Department of the Interior testified that the Department did not require a showing of profit to find a claim to be valid under that law.

To refresh the Court's recollection we call attention to a series of pamphlets issued by the Department of the Interior from time to time almost every year. They are entitled "Lode and Placer Mining Regulations." Mr. Coleman procured one such pamphlet be-

fore he started his first locations in 1949. Others we have are numbered Circular No. 1785, February 1, 1951; Circular No. 1941 amended to include November 1, 1955, etc.; the latest such pamphlet we have is dated July 10, 1964. None of them mention "Marketability at a Profit." One pamphlet is entitled: "Mining Claims; Questions and Answers." It is dated 1963. We quote from the bottom of page 3 thereof and at the top of page 4:

> "There must be an actual physical discovery of mineral on each and every claim and this discovery must satisfy the 'prudent man' rule. *Commercial grade ore is not required* but mere traces, isolated bits of mineral or minor indications are not sufficient to satisfy the 'prudent man' rule." (Emphasis added).

Please note that this pamphlet is issued eight years after the passage of the 1955 law, and nothing is said in the pamphlet in regard to "marketability at a profit." We call attention to the following language in the above quotation:

> "COMMERCIAL GRADE ORE IS NOT REQUIRED * * *"

In other words the public is not informed by the Department of the Interior about the new and additional test of "marketability at a profit."

The Department of the Interior is, of course, bound by its own regulations and particularly the information given to interested members of the public for their guidance. This is not a matter of estoppel but plain honesty.

Further, attention is called to the following provisions contained in Section 552 of the Administrative Procedure Act, 5 U.S.C.:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *"

Until such time as the Department of the Interior complies with the Administrative Procedure Act and publishes its regulations defining "marketability at a profit," it is improper and illegal to apply that test to the Coleman mining claims.

(d) In addition the "marketability at a profit" rule is unconstitutional because it is vague, indefinite and uncertain.

What does "market" mean?

What does "profit" mean?

How should any prospector know while he is operating what will be declared by the Department of the Interior to be a market and what will be declared to be a profit?

This Court has repeatedly declared laws invalid because they are vague and uncertain. One of the latest cases was a decision rendered by this Court on April 22, 1968, the same date that the *Coleman* decision was rendered; the case is *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676.

Another decision on this point was issued by this Court during the 1967 Session, being:

Zwickler v. Koots, 389 U.S. 241.

See also:

Keyishian v. Regents of New York University, 385 U.S. 589 (1967).

Many other decisions could be cited, but the rule is too well known to need elaboration.

Reasons for Granting Writ.

1. The constitutional rights of Mr. Coleman have been denied by the misinterpretation of the mining laws by the Department of the Interior.

2. There is a long-established rule of laws that the mining laws shall be liberally construed in favor of the mining prospector (See Lindley on Mines, Third Edition, Volume II, page 899, section 381). This rule has not been applied in this *Coleman* case.

3. The administration of the mining laws by the Department of the Interior in recent years, and particularly in the *Coleman* case, is contrary to the laws as "passed and intended" by Congress. Such administration is attempted legislation; therefore, is unconstitutional. This is proven by the various recent decisions, and is clearly admitted in an address by H. R. Hockmuth, then Associate Director of the Bureau of Land Management, in an address delivered July 17, 1964, before the Rocky Mountain Mineral Law Institute. The address appears in Volume 10 of the proceedings of

that organization, beginning at page 467. Following are excerpts from that address:

> "There can be no gainsaying that the Mining Law of 1872 is not administered as it was originally written and intended . . ." (p. 473).
>
> "The result is that what we are administering today is not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of our own making . . ." (p. 489).

4. The Department of the Interior misinterpreted section 161 of the mining laws (The Building Stone Act, 30 U.S.C. 161), which was very plain and simple and, therefore, there was no need or legal authority for interpretation. The rule against such interpretation of laws is clearly stated by Mr. Justice Black in a series of lectures on the Constitution delivered by him before the Columbia University School of Law in March, 1968. The lectures have been recently published in a book entitled. "A Constitutional Faith." At page 8 we read:

> "Of course I realize 'that it is a constitution we are expounding.' But this, does not mean that in order to obtain results thought to be desirable at the time, judges may rewrite our basic charter of government under the guise of interpreting it . . ."

Again, on page 20, near the bottom of the page, Mr. Justice Black continues: ". . . The courts are given power to interpret the Constitution and *laws,* which means to explain and expound, not to alter, amend, or remake . . ." (Emphasis added)

5. The 1955 Common Varieties Act was wrongly applied to Mr. Coleman's mining claims because they

were located many years before the 1955 law was passed and, therefore, excluded from that law by its terms.

6. The additional rule for discovery of "marketability at a profit" which this Court states is complementary to the "prudent man" rule, was not published in the Federal Register as required by the Administrative Procedure Act, 5 U.S.C. Section 552. It is, therefore, illegal.

The so-called "marketability at a profit" rule was never published in any of the pamphlets issued by the Department of the Interior for the purpose of informing the public of the General Mining Regulations.

7. The "complementary" rule of "marketability at a profit" is unconstitutional because it is vague and indefinite.

Conclusion.

For the reasons above set forth, it is respectfully submitted that this petition for writ of certiorari be granted and that the case be sent back to the United States Court of Appeals for the Ninth Circuit with a mandate instructing that Court to return the case to the Department of the Interior for further hearing, in accordance with the mining laws and the instructions of this court.

Respectfully submitted,

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W. H. WEDDELL, ESQ.,
MONTA W. SHIRLEY, ESQ.,
Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Alfred Coleman and Edward J. McClennan, *Appellants,* vs. United States of America, *Appellee.* No. 20,227.

ORDER

[December 4, 1968]

Before: CHAMBERS and JERTBERG, Circuit Judges, and THOMPSON, District Judge.

PER CURIAM:

The mandate of the Supreme Court of the United States in this case declares:

"ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings in conformity with the opinion of this Court."

The Opinion of that Court referred to in the mandate states: "* * * [W]e hold that the United States is entitled to eject respondents from the land and that respondents' counterclaim for a patent must fail."

The judgment of the District Court from which this appeal was taken orders, adjudges and decrees:

"1. That the plaintiff, United States of America, is declared to be the sole owner of all right, title and

interest in the lands described herein to the exclusion of any right, title or interest in any asserted mining claims or mining locations of the defendants herein.

"2. That the counterclaim of the defendant Alfred Coleman herein be, and hereby is dismissed.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants herein, their agents, and others acting in concert with or participating with them, are each and all,

"1. Restrained and enjoined from using, occupying or maintaining any structures, equipment or other personal properties on the land described in the complaint herein and set forth in detail in the answer of defendants.

"2. Restrained and enjoined from entering upon, or being upon said lands for the purpose of using and occupying the same pursuant to any asserted mining claims of said defendants, or of either of them, or for the purpose of operating or using any claimed mining locations thereon, or for the purpose of doing any acts or things thereon related to or claimed to be related to said mining claims or mining locations.

"3. Restrained and enjoined from interfering with, impeding, obstructing, or resisting plaintiff, United States of America, its officers or employees, departments or agencies, in any acts or things done or to be done in the exercise of the United States' complete control and dominion over said lands, upon condition that the defendants have 60 days from final judgment on appeal or otherwise, within which to remove or otherwise dispose of structures or any other property on said lands; and

"4. That each party shall bear its costs of suit herein."

This judgment is in complete conformity with the mandate and opinion of the Supreme Court.

Appellant has moved for a hearing or rehearing, hoping that this Court will find in the mandate of the Supreme Court room for discretion to award a new trial or new hearing either in the administrative procedure in the Department of the Interior or before the District Court to determine issues not explicitly discussed and disposed of by the Supreme Court. We find no such ambiguity or flexibility in the mandate and opinion from the Supreme Court. Accordingly,

IT IS ORDERED that the Judgment entered by the United States District Court, Southern District of California, Central Division (now the Central District of California) on February 25, 1965, is affirmed.

CHAMBERS, Circuit Judge, concurring:

There is a puzzle here: Why did the Supreme Court remand the case to us?

But I have reluctantly concluded it left us no discretion. I have tried and failed to find some way we could salvage some part of our original opinion (see 363 F.2d 190) for which I retain my fondness.

APPENDIX B.

The Common Varieties Act of July 23, 1955.

Title 30 U.S.C. 611: (July 23, 1955, c. 375, sec. 3, 69 Stat. 368, amended Sept. 28, 1962, Pub. L. 87-713, Sec. 1, 76 Stat. 652.)

Sec. 611. COMMON VARIETIES OF SAND, STONE, GRAVEL, PUMICE, PUNICITE, OR CINDERS, AND PETRIFIED WOOD

No deposit of common varieties of sand, stone, gravel, pumice, punicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity *to any mining claim hereafter located under such mining laws: Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common Varieties" as used in sections 601, 603 and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the placement of wood by silica or other matter. (Emphasis added.)

The following sections of the Act also limit the law to "mining claim hereafter located": Sec. 612(a)(b)(c).

Section 615 contains provisions protecting the rights of claimants of mining claims located prior to the passage of the Common Varieties Act on July 23, 1955.

APPENDIX C.

Title 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

SUBCHAPTER C—MINERAL LANDS

[Circular No. 2039]

PART 185—GENERAL MINING REGULATIONS

Common Varieties: Defined

Paragraph (b) of § 185.121 is revised in its entirety as follows (and the footnote 2 is deleted):

§ 185.121 *Common varieties: defined.*

* * * * *

(b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commerical value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

JOHN A. CARVER, Jr.,
Acting Secretary of the Interior.

SEPTEMBER 7, 1962.

[F.R. Doc. 62-9184; Filed, Sept. 13, 1962; 8:46 a.m.]

(Emphasis added)

<u>Published in 27 F.R. September 14, 1962</u> - Effective upon publication.

APPENDIX D.

5 U.S.C.—Chapter 5—Administrative Procedure Act.

§522. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of olicy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this

paragraph to be made available or published. (A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1010

JOHN TERREL HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1968. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to February 3, 1969, and the petition was filed on that

day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the purchasing of a ticket for interstate transportion of an acknowledged prostitute constitutes a violation of 18 U.S.C. 2421.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on a one count indictment which charged the procuring of a bus ticket to be used by a woman to travel in interstate commerce for purposes of prostitution (18 U.S.C. 2421). On June 1, 1967, he was sentenced to three years' imprisonment. The court of appeals affirmed.

During 1963, petitioner lived in Detroit, Michigan with a Mrs. Quincy L. Robinson, a prostitute, for whom he was a pimp. In September, when the Detroit Police were getting "hot" (R. 36),[1] Mrs. Robin-

[1] The record on file with the Clerk of this Court, designated herein as "R." contains only the testimony of Mrs. Robinson and petitioner. Since the clerk of the trial court sought agreement from counsel as to which portions of the records required reproduction it is believed that such abbreviation is with the consent of all parties. Petitioner makes mention, however, of the testimony of Audrey Dorsey and Paul Chaiken (Pet. 7, 9). Audrey Dorsey, the madam of the Terre Haute brothel, appeared as a witness but her testimony was not transcribed (R. 41). Paul Chaiken was petitioner's em-

son informed petitioner that there was prospective work for her in Terre Haute, Indiana and furnished him with a Terre Haute telephone number. He called Terre Haute, gave the respondent Mrs. Robinson's physical description and his assurances that Mrs. Robinson would soon arrive. Petitioner then accompanied her to the Detroit bus station and purchased her ticket for Terre Haute (R. 6-16).

In Terre Haute Mrs. Robinson worked as a prostitute for a six week period. Petitioner visited her twice and received some of her money each time. She also wired him some funds through Western Union. After the police in Terre Haute also became "hot", petitioner wired Mrs. Robinson money for an airflight back to Detroit. When he met her at the Detroit airport, she gave him the $1,000 residue of the approximately $3,000 she had earned in Terre Haute (R. 19-26).

Petitioner testified that he had lived with Mrs. Robinson and knew she was a prostitute, but that it was she who made the call to Terre Haute and that he did not purchase her ticket. He visited her twice while she worked in Terre Haute, and later sent her money to come back to Detroit. They resumed their cohabitation when she returned (R. 44-61).

ARGUMENT

1. Petitioner argues that the evidence is insufficient because the proof that he purchased the ticket for

---

ployer at sometime after 1963. During 1963 petitioner claimed to be self-employed while Mrs. Robinson testified he was unemployed (R. 8, 43-45).

Mrs. Robinson in order to have her go to Indiana to act as a prostitute depends on her uncorroborated testimony. The trial court sitting without a jury, was in the best position to judge the candor and credibility of the witnesses. Mrs. Robinson's testimony, if believed by the trial court, was sufficient to convict. *Caminetti* v. *United States*, 242 U.S. 470, 495; *Singleton* v. *United States*, 381 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1024; *United States* v. *Terry*, 362 F.2d 914, 916 (C.A. 6), certiorari denied, 385 U.S. 1029.

2. The Mann Act applies to the furnishing of transportation to known prostitutes for the purpose of having them travel to another state to ply their trade. See *Bell* v. *United States*, 349 U.S. 81, 84; *Forrest* v. *United States*, 363 F.2d 348 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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MARCH 1969.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1023

ROBERT E. RATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a jury trial of willfully attempting to evade federal income taxes, in violation of Section 7201 of the Internal Revenue Code of 1954. At his trial the prosecution introduced several hundred exhibits (Pet. 8) and numerous witnesses (Pet. 3) to prove the underlying facts, followed by a summary exhibit offered by an expert witness whose qualifications petitioner has conceded (Pet. 5, 8).

Petitioner contends that the summary and the expert's testimony invaded the province of the jury (Pet. 5). This was laid to rest in *United States* v. *Johnson,* 319 U.S. 503, 512–520; and the use of

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expert testimony to evaluate the evidence in criminal (or other) tax cases has been standard practice ever since. In *Johnson*, it was observed that by "proper guidance" from the trial court the jury must be left free to "exercise its untrammeled judgment upon the worth and weight of testimony" (p. 519). Here, the court's instructions (Pet. 12–13) explicitly left the ultimate facts to the jury's determination,[1] and petitioner does not even attempt to show how the instructions were inadequate. He accepted them in the trial court and proposed no different instructions (R. 22b–27b, 32b–33b). Clearly there is no justification for granting certiorari in order to review the court of appeals' conclusion that (Pet. 8) "The exhibit was based upon evidence previously received and the trial judge properly instructed the jury concerning it."

Petitioner also asserts that he "was convicted by a mass of irrelevant testimony" (Pet. 6). Petitioner did not contend in the court of appeals that there was a lack of evidence to support his conviction or that evidence was admitted which should have been excluded. It is obviously too late to advance such a contention now.

---

[1] In addition, the prosecutor told the jury (R. 35b): "So Mr. Schiller [the expert witness] has assumed certain things from the evidence. If you don't reach the same finding, Ladies and Gentlemen, you can disregard item by item whichever you don't so find." "R." references are to the Appendix to the Government's brief in the court of appeals.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1030

ALFRED E. COLEMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
WALTER J. HICKEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

In *United States* v. *Coleman*, 390 U.S. 599, this Court reversed the previous decision of the Ninth Circuit in this case and remanded the case to that court "for further proceedings to carry out this [Court's] decision." *Id.* at 605. The court of appeals then entertained briefing and oral argument concerning the scope of this Court's decision and petitioners' additional objections. It concluded that there was "no such ambiguity or flexibility in the mandate and opinion from

the Supreme Court" as petitioners urged, and accordingly affirmed the original judgment of the district court, which it found to be in complete conformity with this Court's action (Pet. App. A-3).

This action was clearly correct. The present petition reiterated arguments most recently presented to this Court in *The Dredge Corp.* v. *J. Russell Penny*, No. 796, this Term, certiorari denied January 27, 1969. In our view, it presents no matter justifying either review in this Court or further delay in awarding the United States possession of this portion of the National Forest and excluding petitioners from continued operations therein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1969.

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IN THE

Supreme Court of the United States

October Term, 1968.
No. 1030

ALFRED E. COLEMAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA and WALTER J. HICKEL, Secretary of the Interior,

Respondents.

REPLY BY PETITIONERS TO MEMORANDUM FOR THE RESPONDENTS.

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IN THE

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October Term, 1968.
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ALFRED E. COLEMAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA and WALTER J. HICKEL, Secretary of the Interior,

Respondents.

REPLY BY PETITIONERS TO MEMORANDUM FOR THE RESPONDENTS.

Statement.

The Department of the Interior, through its attorneys, has filed a Memorandum for the Respondents in opposition to our Petition for Writ of Certiorari in the above case.

This Reply is in answer to said Memorandum.

ARGUMENT.

I.

Since the filing of the Petition for Writ of Certiorari herein, there has been a substantial change, which, in our opinion, requires the granting of the Writ of Certiorari and a re-argument of the case.

The former Secretary of the Interior, Stewart L. Udall, was made a defendant in the case and has been a respondent up until the new Secretary, Walter J. Hickel, was appointed.

The first notice that petitioner had of the change in one of respondents was the receipt from the Solicitor General's office for copies of the petition which we sent him.

Again, the attention of the Court is directed to the philosophy of the Department of the Interior concerning the mining laws which was stated by Mr. H. R. Hochmuth in his address to the Rocky Mountain Mineral Law Institute in July of 1964, from which we quote three passages.

> "Had not this conversion been made, a new mining law would have been an absolute necessity many years ago."
>
> "There can be no gainsaying that the mining law of 1872 is not administered as it was originally written and intended."
>
> "The result being that what we are administering today is not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of our own making."

With the new Secretary of the Interior there undoubtedly will be a new philosophy in the Department of the Interior. Therefore, the new Secretary should have the opportunity of examining the *Coleman* case and stating the corrected views of the Department.

II.

No case is finally decided until it is decided correctly. The decision of this Court on April 22, 1968 was based on statements of law and fact made by the attorneys for the Department of the Interior, which are contrary to the evidence which appears in full in the appendix filed herein (292 pages long) and laws applicable thereto which are discussed in our petition.

(a) For instance, the pertinent portion of Section 161 of the Mining Laws (30 U.S.C.), applicable hereto, is clear and simple and therefore there was no authority under the law for this Court to interpret that section to be limited to special kinds of building stone.

(b) At the hearing of the contest complaint the Hearing Examiner stated to Mr. Coleman, who tried his own case, as follows:

> "Hearing Examiner Wood: This is not a contest on Public Law 167, Mr. Coleman."

This statement appears at page 139 of the Appendix and should have been noted by whoever did the research for this Court. Therefore, the question of the common varieties of the 1955 law had no place in this decision.

III.

The Solicitor General, in his Memorandum in opposition to our Petition, received February 20, 1969, refers to the action of the Ninth Circuit in stating they could find no authority to do anything under the mandate from this Court.

The fact that the Court of Appeals for the Ninth Circuit permitted the filing of a Petition by Coleman, *et al.* and set the matter down for argument, is proof that the Court felt there was merit in the Petition of Coleman, *et al.* Otherwise, the Petition would have been summarily dismissed by the Ninth Circuit.

We quote the concurring statement of Chief Judge Chambers where he said:

> "There is a puzzle here: Why did the Supreme Court remand the case to us?
>
> "But I have reluctantly concluded it left us no discretion. I have tried and failed to find some way we could salvage some part of our original opinion (see 363 F.2d 190) for which I retain my fondness."

This again proves that the judges of the Ninth Circuit must have believed that there was merit in the Coleman petition.

IV.

The Solicitor General, on page 2 of his Memorandum, refers to the return of the land to the National Forest. This reminds us of the error in the original brief in this case by the Government and the decision of this Court which indicates its belief that Mr. Coleman was not in good faith in locating the stone.

While the land covered by the Coleman mining claims is within the National Forest, it is not Forest land because it is covered by huge stones and is good for nothing else but production of such stone as authorized by Section 161 of the Mining Law. This is clearly proven by the following, which appears in the District Court record and/or the Appendix.

A direct finding as to the good faith of Mr. Coleman is stated in the decision of the Director of the Bureau of Land Management. The following language appears at page 257 of the Appendix in this case.

> "It is clear from the patent application and evidence submitted at the hearing, that the Baldwin Lake Quarry Claims were located solely for the building stone therein contained under the Act of August 4, 1892 (30 U.S.C. sec. 161)."

That the land is good for nothing except producing building stone is proved by the following.

The United States Attorney, in filing his original Motion for Summary Judgment, attached thereto as Exhibit 2 a report made by D. M. Tucker, Recreation and Lands Staff Officer to the Regional Forester, concerning the Coleman mining claims. Here is final statement on page 2.

> "2. What use do we intend to make of the lands?
>
> A. *Timber*—No commercial timber on the claims. Pinyon and juniper serve esthetic and soil erosion purposes.
>
> B. *Forage*—No forage present.
>
> C. *Watershed*—No extraordinary problems involved due to rock and shale being present.
>
> D. *Wildlife*—No wildlife dependent on the area but the spring involved should be used for the development of water fowl habitat in connection with Baldwin Lake.
>
> E. *Minerals*—Is a source for local building stone. No use of any consequence of this stone other than in the Big Bear area with a few loads going out of the Valley.

3. What are the claims suitable for?

They are suitable for scenic views, forest and mountain esthetics and for supplying building stone for local uses."

This is further supported by the following finding in the decision of the Director of the Bureau of Land Management on appeal and is found on page 254 of the Appendix filed herein.

"* * * Applying the comparative value test to the lands within these claims, as no evidence has been presented that the lands have value for recreational or other non-mining purposes exceeding the values of the lands for their building stone, it must be conceded that the lands are 'chiefly valuable' for their building stone."

For the reasons herein stated, in addition to the reasons stated in our Petition for Certiorari, we respectfully request that a Writ of Certiorari be granted so that justice may be done to Alfred Coleman, the locator of the claims and a prospector in the true sense of the word, as intended by the Mining Laws of the United States originally passed in 1872, for the benefit of individuals.

Dated: February 24, 1969.

Respectfully submitted,

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